

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP561

Cir. Ct. No. 2008FA1527

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KELLY LYNN JACKSON,

JOINT-PETITIONER-APPELLANT,

V.

TRENT PERROTTA JACKSON,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Kelly Jackson appeals pro se the final placement order in a series of post-divorce decisions on custodial decision-making, placement, and support that were issued after her ex-husband, Trent Jackson, moved to modify the parties' physical placement schedule and reduce his child

support obligation and Kelly filed several cross-motions relating to custodial decision-making, placement, and support. The final placement order also resolved several pending contempt matters that had arisen during the proceedings. We affirm all of the challenged decisions for the reasons discussed below.

BACKGROUND

¶2 This case comes to us with a lengthy and complicated history. We will begin by setting forth the procedural facts necessary to place the current appeal in context, and will add additional facts relevant to the nine issues raised on appeal in our discussion of each of those issues.

¶3 Kelly and Trent were divorced in 2009, pursuant to a marital settlement agreement that was approved by the circuit court. The agreement awarded the parties joint legal custody and gave Kelly full placement subject to “reasonable” visitation for Trent, anticipating that Kelly would be moving to California with the parties’ two minor children so that the children could pursue acting careers. The marital settlement agreement further provided that Trent would pay Kelly \$2,600 per month in child support and \$3,400 per month in maintenance, for a period not to exceed ten years.

¶4 In 2011, Trent moved to reduce or suspend his maintenance obligation after he left the job he had held at the time of the divorce to start his own company, resulting in a substantial reduction of income. After a hearing, the circuit court granted Trent’s motion and suspended maintenance, while leaving the existing child support order in place.

¶5 In November 2012, Trent moved to modify the parties’ physical placement schedule, alleging that, in addition to the change in Trent’s work hours

as a result of his new self-employment, Kelly had moved back to Wisconsin. Trent also filed an objection to having Kelly return to California with the children. In response, Kelly disputed that she had moved back to Wisconsin, and moved for a change of venue to the children's home state of California. Kelly also moved to dismiss Trent's placement modification motion on the grounds that Trent had not served the motion upon her at her California address.

¶6 In January 2013, while the placement modification motion was still pending, Trent filed an additional motion seeking a reduction in child support based upon further changes to his income level, as well as an order directing Kelly to seek work.

¶7 On February 15, 2013, the circuit court determined that Wisconsin had continuing subject matter jurisdiction over placement and child support issues, and it denied Kelly's motion to dismiss Trent's pending motions to modify placement and child support. Shortly thereafter, the court appointed a guardian ad litem for the children, and ordered each of the parties to pay \$750 toward the G.A.L.'s retainer.

¶8 On February 27, 2013, Kelly filed a motion seeking an award of maintenance, as well as contributions to her costs and attorney fees. The motion also asked for a ruling that Trent would need to establish a substantial change of circumstances in order to modify child support and a finding of claim preclusion regarding Trent's earning capacity.

¶9 On March 18, 2013, a court commissioner entered a temporary order on physical placement and a separate order granting Trent's motion for reduced child support and denying Kelly's motions for maintenance, costs, and claim preclusion. Kelly sought de novo review of the decision.

¶10 Meanwhile, a Family Court Counseling Service (FCCS) study was conducted, and in June 2013, Trent and Kelly were each ordered to pay a portion of that fee.

¶11 On August 13, 2013, Trent moved to hold Kelly in contempt for failing to abide by the terms of the temporary order regarding his periods of placement. By a separate order issued on August 14, 2013, the court commissioner directed Kelly to appear on September 6, 2013, to show cause why she should not be held in contempt for failing to pay her portion of the FCCS fee.

¶12 On August 22 and 23, 2013, the circuit court, Judge Shelly Gaylord presiding, held a de novo hearing on the pending placement and support issues. At the beginning of the hearing, Kelly testified that she generally agreed with, and would stipulate to, several of the placement recommendations that had been made, effectively narrowing the issues remaining for trial to those involving summer placement and flexibility to accommodate the children's acting schedules. During a break in the evidence, Judge Gaylord engaged in a conversation approximately forty-five minutes to an hour long with the GAL and counsel for Trent, outside of Kelly's presence. Following the hearing, Judge Gaylord directed the parties to provide the court with additional information, and subsequently issued an order dated August 28, 2013, addressing all of the then-outstanding issues regarding placement and support, as well as Trent's contempt motion relating to his periods of placement.

¶13 On September 6, 2013, after Kelly failed to appear in response to the August 14, 2013, order to show cause, a court commissioner entered a default order on the pending contempt motion regarding the FCCS study fee.

¶14 On September 17, 2013, Kelly moved to vacate Judge Gaylord's August 28, 2013, decision based upon the ex parte communication that had taken place during the hearing. Kelly also sought reimbursement for costs and fees that she had incurred related to the de novo hearing, and requested that Judge Gaylord recuse herself from further proceedings. Judge Gaylord found that the ex parte communication related primarily to which remaining witnesses would testify; that it did not include any improper discussion about substantive matters that could provide an advantage to either party; and that the gist of the ex parte communication was subsequently repeated on the record, without explicitly stating that was what was happening. Nonetheless, Judge Gaylord concluded that the failure of either the court or the parties to explicitly put a description of the ex parte communication on the record could lead Kelly to wonder what had occurred in her absence and thus question the impartiality of the court. Accordingly, on January 6, 2014, Judge Gaylord entered an order agreeing to recuse herself, leaving the questions whether to grant a new trial and award costs and fees to be decided by her successor.

¶15 On September 12, 2013, the guardian ad litem filed an additional motion for contempt against Kelly, alleging that Kelly had failed to pay her portion of the GAL fees. On September 24, 2013, based on a motion by Trent, the court commissioner entered another order directing Kelly to appear to show cause why she should not be held in contempt for failing to comply with terms set forth in the August 28, 2013, order, relating to the children's passports and reimbursement for some of the children's travel costs. On November 14, 2013, the court commissioner found Kelly to be in contempt with respect to both the GAL fees and the passport and travel cost issues.

¶16 On December 27, 2013, Trent filed another motion for contempt, alleging that Kelly continued to interfere with terms of Judge Gaylord's August 28, 2013, order relating to Trent's placement, including keeping him from seeing the children over Christmas. Trent also sought to modify the placement order based upon Kelly's alleged noncompliance. On January 30, 2014, the court commissioner again found Kelly in contempt, and transferred temporary primary physical placement of the children to Trent as a result. The contempt order directed that Kelly would spend six months in jail, in ninety day increments, unless she purged her contempt by returning the children to Wisconsin, and required her to pay \$3,608.86 towards Trent's attorney fees and travel expenses, to be applied as a credit on Trent's support obligations.

¶17 Kelly moved for both a de novo hearing and also relief from the January 30, 2014, contempt order, alleging that Trent was interfering with one of the children's ability to work on a television show. On February 12, 2014, the circuit court held an evidentiary hearing on Kelly's request for relief from the contempt order.

¶18 In June 2014, Kelly moved to hold Trent in contempt for alleged violations of the August 28, 2013 order, and to stay any further proceedings on placement or child support in Wisconsin. The motion was based upon allegations that Trent was impeding the children's acting careers by withholding consent for them to attend auditions or jobs during Trent's scheduled placement times.

¶19 On June 11, 2014, Judge Albert entered an order agreeing to revisit the question of jurisdiction that had been previously determined in February 2013, because Kelly had by then filed a separate action in California seeking maintenance and an increase in child support. The circuit court subsequently

determined that it would be most efficient to combine de novo hearings on the pending contempt matters with Kelly's still pending motion to vacate Judge Gaylord's final decision on placement. The circuit court held a joint hearing on those matters on July 1 and 2, 2014.

¶20 Following the joint hearing, the circuit court granted Kelly partial relief from Judge Gaylord's final decision on placement and support. Specifically, the court determined that the August 28, 2013, order would be vacated in part, and the hearing would be reopened to allow Kelly to present two additional witnesses relating to placement issues, but that the previously provided testimony and evidence would remain on record.

¶21 The circuit court then held a hearing on the reopened placement issues on July 22, 2014, and continued the hearing on October 2, 2014.

¶22 On January 29, 2015, the circuit court entered the final order that is the subject of this appeal. The order, in conjunction with explanations of its rulings that the court had made during the series of evidentiary hearings it had held, resolved all remaining issues that were then pending in Wisconsin by: (1) reaffirming that the issue of placement was properly before the Wisconsin court;¹ (2) determining de novo that Kelly was *not* in contempt regarding school choice in the spring of 2013; (3) determining de novo that Kelly was *not* in contempt for failing to turn over the children's expired passports in a timely manner; (4) determining de novo that Kelly was *not* in contempt for failing to

¹ Additionally, during a hearing at which the judge presiding over Kelly's California case participated by telephone, both Judge Albert and the California court agreed that Wisconsin would retain exclusive continuing jurisdiction over child support issues in the future, unless Trent moved out of the state or the parties signed a written agreement to transfer venue.

allow Trent to exercise his scheduled placement in December 2013; (5) determining de novo that Kelly *was* in contempt for failing to pay the guardian ad litem's fee, and ordering that she spend forty-eight hours in jail as a sanction for that contempt, unless she purged the contempt by paying the guardian ad litem \$5,000 out of her manager's commissions; (6) determining de novo that Kelly *was* in contempt for failing to transfer money to Trent for the children's air fare, and ordering that she spend forty-eight hours in jail as a sanction for that contempt, unless she purged the contempt by paying \$5,000 out of her manager's commissions; (7) modifying the terms of the parties' joint custody to direct that all contacts with entertainment industry representatives on the children's behalf would be through Kelly; that Kelly would have sole possession of the children's passports and managerial control over the children's financial accounts; that Trent was to be given the necessary passwords to be able to monitor the children's financial accounts without making any withdrawals or transfers to or from them; that Trent would have sole discretion whether to interrupt his placement time in Wisconsin to accommodate last minute auditions or jobs for the children and would make the transportation arrangements for such short-notice interruptions, but would be reimbursed for one-third of the cost by Kelly, and one-third of the cost from the children's accounts; (8) establishing what the penalties would be if Kelly or Trent violated the terms of the custody decision; (9) adopting a modified placement schedule in which Trent would have a six-day period of placement in Wisconsin including Easter every other year; Trent would have a seven-night period of placement in Wisconsin including the 4th of July every year; Trent would have a seven-day period of placement in Wisconsin including Thanksgiving every other year; Trent would have placement in Wisconsin from December 18th until December 28th every year; Trent would have one six-night period of placement in Wisconsin during either May or June of each year, and another six-

night period of placement in Wisconsin during either August or September of each year, with Kelly, Trent, and the children each being responsible for one-third of the costs of the children's transportation. In an addendum to the final judgment added in response to a motion by Trent for reconsideration, the court ordered that Trent would also have four consecutive days of placement in California during any month in which he did not have placement in Wisconsin, upon giving Kelly 14 days notice of his intent to exercise placement. Kelly appeals the final order and order denying reconsideration.

DISCUSSION

Subject Matter Jurisdiction

¶23 Kelly first argues that the circuit court lacked subject matter jurisdiction to enter any orders related to placement—and in particular, the January 29, 2015 order—because the children's home state was California. This argument is premised upon a misunderstanding of the law.

¶24 Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been adopted by both Wisconsin and California, a child's home state is relevant to determining jurisdiction for an *initial* custody or placement determination, and for determining what state can modify a child custody or placement order if the state exercising initial jurisdiction has *lost* its exclusive jurisdiction. See WIS. STAT. §§ 822.21 and 822.23² and CALIF. FAM.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

CODE § 3421 and 3423. However, a child's home state is *not* determinative of *continuing* exclusive subject matter jurisdiction.

¶25 Rather, under the UCCJEA, the state that makes an initial custody or placement determination retains exclusive continuing jurisdiction over subsequent custody and placement decision unless and until: (1) “neither the child, nor the child and one parent ... have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships”; or (2) neither the child nor either parent still reside in this state. WIS. STAT. §§ 822.22(1)(a) and (b) and CALIF. FAM. CODE §§ 3422(1)(a) and (b).

¶26 Here, Wisconsin exercised jurisdiction over the initial divorce judgment because both parents and both children lived in this state at that time. The fact that custody was not disputed at the time of the parties' divorce does not alter the fact that the divorce judgment contained a joint custody determination, and therefore qualified as the initial custody determination in this matter for jurisdictional purposes.

¶27 Judge Gaylord determined, based upon undisputed allegations in an affidavit submitted by Trent, that Trent had continued to reside in this state since the divorce; that the children maintained significant connections here through their summer visits; and that some evidence relevant to custody was still available in this state. We agree that the undisputed facts that Trent still lived in Wisconsin and that the children were spending significant amounts of time here in the

summers³ support the legal determination that Wisconsin retained exclusive continuing jurisdiction over custody and placement issues.

¶28 Kelly makes an additional argument that the circuit court lacked jurisdiction based upon a forum clause in the marital settlement agreement stating that California would have jurisdiction to modify the custody and placement provisions from the original divorce once the children had resided in California for six months. The forum clause is unenforceable on the question of jurisdiction, however, to the extent that it contradicts the UCCJEA, because jurisdiction cannot be created by a stipulation or consent of the parties.

Relief from August 28, 2013 Order Based Upon Ex Parte Communication

¶29 Kelly argues that Judge Gaylord's August 28, 2013, decision should have been vacated in its entirety based upon the ex parte communication among Judge Gaylord, the GAL, and Trent's attorney that occurred during the placement modification hearing. This contention fails for at least two reasons.

¶30 First, in a letter dated September 10, 2013, Judge Gaylord informed the parties that her recollection of the ex parte communication was that they "discuss[ed] witnesses still needed/waiting" and "rehashed evidence submitted thus far—as in repeating it, not adding" anything. Kelly did not provide testimony from any of the participants of the ex parte communication that would contradict the circuit court's finding as to what was discussed. Rather, Kelly pointed to

³ Kelly disputed a number of facts relevant to determining the children's home state and whether Kelly had intended to reside in Wisconsin when she brought the children back here for about a month, but those facts were not material once the court determined that it had exclusive continuing jurisdiction based upon substantial contacts.

subsequent comments made by Judge Gaylord relating to various issues that Kelly felt had little or no factual basis in other parts of the record, from which Kelly made inferences that certain matters must have been discussed out of her presence. The circuit court was not required, however, to make the inferences that Kelly suggests. In short, Kelly has not provided any factual basis in the record that would compel the conclusion the ex parte communication involved improper discussion of substantive matters.

¶31 Secondly, even if some of the “rehashed evidence” during the ex parte communication related to placement or custody issues beyond what witnesses were left to testify were addressed, it does not follow that all of Judge Gaylord’s rulings would need to be set aside. To begin with, Judge Gaylord had already ruled on jurisdiction and the parties had already reached stipulations, on the record, to many of the placement issues *before* the ex parte communication occurred. Additionally, both Judge Gaylord’s and Judge Albert’s decisions as to child support and maintenance were plainly based upon evidence that was adduced on the record during multiple hearings. Finally, to the extent that Kelly believes that Judge Gaylord’s decisions about school choice and the children’s passport decisions may have been influenced by something said during the ex parte communication, Judge Albert made de novo determinations on those issues, and decided them in Kelly’s favor. In sum, Kelly has not demonstrated that she was entitled to any additional relief based upon the ex parte communication.

Contempt Procedures by Court Commissioner

¶32 Kelly next complains about several procedural aspects of the contempt proceeding related to GAL fees that was held by the court commissioner on October 23, 2013, including not being able to appear telephonically or present

witnesses. However, the circuit court granted Kelly's request for a de novo hearing on the issue of guardian ad litem fees, and Kelly was provided an opportunity to present testimony and argument on that issue at the combined hearing Judge Albert held on July 1 and 2, 2014. Thus, any procedural errors that may have occurred during the proceeding in front of the court commissioner were cured by the subsequent proceedings held before the circuit court.

Guardian Ad Litem Appointment and Assessment of Fees

¶33 Kelly next challenges the circuit court's initial order requiring her to pay \$750 toward the guardian ad litem's retainer. Kelly contends that she should not have been required to contribute to the GAL fees—if a GAL should have been appointed at all—because she was indigent and receiving public assistance at the time the GAL was appointed.

¶34 We note that the fact that parties may be indigent does not determine whether a GAL should be appointed, and we are satisfied that the appointment was plainly appropriate here, where placement and custody issues were at stake. We also agree with the circuit court that it could not direct that the GAL fee be covered by the county, because there was no showing that Trent was indigent. Therefore, the only question is whether the circuit court could properly assess a portion of the GAL fees to Kelly.

¶35 Kelly notes that Trent made an offer to pay the entire GAL fee when he asked that a GAL be appointed, and argues that the court therefore should have assessed the entire fee to Trent. However, the court was not required to accept Trent's offer. The court determined that Kelly was able to pay her portion of the

GAL fee based upon “household income,” which included not only income from the children, but also Kelly’s own management fees from the children’s income. Contrary to Kelly’s assertion, we see nothing in the California statutes that she cites that would prevent the court from considering the children’s non-trust earnings as an available source of income for Kelly. Moreover, given the evidence in the record that Kelly had in fact been using the children’s earnings to support her household, we cannot conclude that the circuit court’s decision was factually unsupported.

Modification of Child Support Order

¶36 Kelly argues that the circuit court erred by failing to make a finding of a substantial change in circumstances before reducing Trent’s support payments from \$3,400 in child support and \$2,600 in maintenance to \$400 in family support. However, Kelly filed a cross-motion seeking reinstatement of maintenance and an increase in child support based upon her own allegation that there had been a substantial change in circumstances. She cannot now complain that the court implicitly accepted a premise that had been argued by both parties.

¶37 Furthermore, according to the parties’ financial disclosure statements, Trent’s monthly income at the time of the divorce was \$11,587.50, while his monthly income at the time the child support order was modified had been reduced to \$2,000. That reduction in income plainly constituted a substantial change in circumstances, whether or not the circuit court explicitly so stated.

¶38 Kelly next argues that the circuit court failed to “properly analyze records and evidence” because she did not present her own financial disclosure statement to the court when asked for it during the August 2013 hearing.

However, Trent introduced Kelly's financial disclosure statement as exhibit 6 at that hearing.

¶39 Kelly next challenges the circuit court's authority to order that the children pay part of the cost of their own airline tickets. However, the California statutes that she provided to the circuit court would not prevent the use of the children's income (other than those funds that had been set aside in trusts) for the children's own support and transportation for placement.

¶40 Kelly next challenges the circuit court's decision to deviate from the child support guidelines based upon a finding that the children were earning more money than either of the parents, claiming that the court was relying in part upon unemployment payments to the children that would be only temporary. However, the circuit court stated that it was anticipating that the unemployment payments would last 17-22 weeks, so it was not operating upon the mistaken assumption that the unemployment payments would be a permanent source of income.

¶41 Finally, Kelly claims that the court commissioner erred by issuing Trent a credit against his support obligation for the attorney fees that Kelly owed as a result of one of the contempt proceedings that involved the subsequently vacated contempt rulings regarding school choice and passports. Aside from the fact that we review the circuit court's de novo decision, rather than the original court commissioner decision that it replaced, Kelly ignores the fact that two other contempt rulings from that same proceeding—namely involving GAL fees and compensation for the children's airfare—were reaffirmed by the circuit court. Kelly has not shown that it was inappropriate to assess her for the attorney fees Trent incurred in attempting to obtain her compliance with the court's order.

Modification of Placement

¶42 Kelly contends that the circuit court erred by failing to make explicit findings of fact that a substantial change in circumstances had occurred and that a modification of placement would be in the children's best interests as required by WIS. STAT. § 767.451(1)(b)1. However, Kelly fails to acknowledge that she stipulated at the beginning of the initial placement modification hearing that some modification of the placement schedule was warranted. We conclude that any error by the circuit court in failing to make an explicit finding that there had been a substantial change in circumstances was harmless, here, where Kelly did not place that particular issue into dispute, and then proceeded to argue as to what the placement schedule should be. As to the best interests of the children, we take the court's statement that its decision took into consideration the best interests of the children to be the functional equivalent of a factual finding that placement modification would be in the children's best interests.

¶43 Kelly also challenges the circuit court's decision that Trent can decide whether or not the children can participate in acting auditions or jobs during his periods of placement, arguing that it is not in the children's best interests. However, allocating the decision-making authority between the parents was a discretionary determination, and the court's discussion plainly demonstrates that it exercised its discretion by applying appropriate legal standards to the facts before it. Moreover, the circuit court could properly refuse to accept Kelly's view that Trent had deliberately attempted to sabotage the children's acting careers, and that is a credibility determination that we will not set aside on appeal.

Attorney Fees for Motion to Vacate

¶44 Kelly argues that she was entitled to costs and attorney fees, as well as damages for stress-related hospital bills, mental anguish, and other financial

harms she claimed to have suffered as a result of the ex parte communications that led to her filing a motion to vacate the original placement decision. As we have already explained above, however, the record does not support a determination that any improper ex parte communications occurred.

Transfer of Jurisdiction to California Based Upon a Non-Convenient Forum

¶45 Under WIS. STAT. § 822.27, a Wisconsin court “may decline to exercise its jurisdiction” over a child custody matter if it determines that Wisconsin is an inconvenient forum, and that another state would be a more appropriate forum. This is a discretionary decision, however, and there is nothing in the record that would have compelled the circuit court to grant Kelly’s motion to cede its jurisdiction to California. Moreover, as noted *supra* at n.1, the judge of the California court where Kelly had sought to have future child support and maintenance matters heard agreed with Judge Albert that Wisconsin should retain jurisdiction over those matters.

Ex Parte Hearing on April 30, 2014

¶46 Kelly argues that the circuit court erred by taking evidence at a telephonic hearing that Kelly’s attorney at the time, Michele Perreault, was unable to attend. The transcript indicates that Attorney Marsha O’Donnell made an appearance on Kelly’s behalf at that hearing in place of Perreault, and that neither Kelly nor O’Donnell offered any objection to proceeding. Kelly now asserts that O’Donnell was actually Perreault’s secretary rather than co-counsel, but she does not point to any place in the record where anyone explained who O’Donnell

actually was. In any event, we conclude that any error in proceeding to take testimony from the parties at the hearing without counsel for Kelly being present was harmless, because the result of the hearing was that the circuit court *granted* Perreault's pending motion to withdraw and Kelly's pending request for a de novo hearing.

¶47 Kelly further objects to the circuit court's requirements that she attend the de novo hearing in person, rather than by phone, and that she use money from the children's earnings to pay for an airline ticket to attend the hearing. However, the circuit court provided a reasonable explanation for its requirement that Kelly appear in person—namely, that credibility would be a factor in several of the issues before the court. As we noted above, Kelly has failed to provide any legal authority that would preclude use of the children's income, outside of their trust accounts.

By the Court.— Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

